Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
City Signal Communications, Inc. Petition for Declaratory Ruling Concerning Use of Public Rights of Way for Access to Poles in Cleveland Heights, Ohio Pursuant to Section 253	)	CS Docket No. 00-253

COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T"), by its attorneys, respectfully submits these comments in support of the petition for declaratory ruling filed by City Signal Communications, Inc. ("City Signal").[1/] City Signal argues that Cleveland Heights, Ohio's ("Cleveland Heights") prohibition on aerial construction of facilities by competitive local exchange carriers ("CLECs") but not by incumbent local exchange carriers ("ILECs") has the effect of prohibiting its ability to provide interstate or intrastate telecommunications service, and requests that the Commission issue an order directing Cleveland Heights to grant City Signal a permit to construct aerial fiber optic facilities in the City.[2/] Because Cleveland Heights' actions violate Section 253(a) of the Communications Act and are not saved by Section 253(c), the Commission should grant the requested relief.

DISCUSSION

I. LOCAL AUTHORITY UNDER SECTION 253

The Telecommunications Act of 1996 divides regulatory responsibilities among federal, state, and local governments. The linchpin of this framework is Section 253, which prohibits

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1/ See Comments Sought on City Signal Communications, Inc. Petition for Declaratory Ruling Concerning Use of Public Rights of Way for Access to Poles in Cleveland Heights, Ohio Pursuant to Section 253, CS Docket No. 00-253, Public Notice, DA 00-2870 (rel. Dec. 22, 2000) ("Public Notice").

2/ Petition for Declaratory Ruling, filed by City Signal Communications, Inc. on Oct. 18, 2000 ("Petition").

state and local legal barriers to the provision of interstate or intrastate telecommunications services. Within this framework, local governments retain their traditional role of overseeing the use of public rights-of-way, while the states regulate intrastate telecommunications services consistent with the applicable provisions of the Act and the Commission's rules. To carry out the federal policy of open entry and competition, the Commission is charged with preempting any state- or locally-imposed entry barrier.

The Commission's previous orders have made clear the limited role that localities should play in the regulation of telecommunications.[3/] But even where cities engage in permissible rights-of-way management and collection of fees, Section 253(c) mandates that cities do so on a "competitively neutral and nondiscriminatory" basis. For example, at least one court has found that a city cannot charge a new entrant a fee that the city cannot charge the incumbent.[4/] And the Commission has invalidated several state legal requirements because they favored ILECs over CLECs and therefore were not competitively neutral.[5/]

[3/] See, e.g., Classic Telephone Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order, 11 FCC Rcd 13082 at ¶ 39 (1996), vacated as moot, FCC 00-432 (rel. Dec. 12, 2000), citing 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Senator Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco); TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 USC §§ 541, 544(e) and 253, Memorandum Opinion and Order, 12 FCC Rcd 21396 at ¶¶ 102-106 (1997), aff'd, Order on Reconsideration, 13 FCC Rcd 16400 (1998).

[4/] City of Chattanooga v. BellSouth Telecom, Inc., No. 96-CV-1155 (Cir. Ct., Hamilton County, Tenn. Jan 4, 1998). But see TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785 (E.D. Mich. 1998) (appeal pending) (finding statute is satisfied by imposing comparable burdens on telecommunications providers). See also Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston, 184 F.3d (1st Cir. 1999) (finding Congressional intent to require competitive neutrality for rights-of-way management as well as compensation, because "discriminatory or competitively slanted management of the public rights-of-way could interfere with open competition among telecommunications providers just as easily as discriminatory or competitively slanted compensation schemes").

[5/] See, e.g., Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, 13 FCC Rcd 16356 at ¶¶ 9-11 (1998) (finding that a state legal requirement is not competitively neutral if it favors ILECs over new entrants); In the Matter of AVR, L.P. d/b/a/ Hyperion of Tennessee L.P. Petition for Preemption of Tennessee Code Annotated § 65-4-201(D), Memorandum Opinion and Order, 14 FCC Rcd 11064 at ¶ 16

The term "competitively neutral" is used in other sections of the Communications Act and the Commission has consistently interpreted it to prohibit regulatory distinctions that give one provider a cost advantage over another. For example, in the Telephone Number Portability Order, the Commission interpreted the term "competitively neutral" in Section 251(e)(2) of the Act to require that the cost of number portability "not affect significantly any carrier's ability to compete with other carriers for customers in the marketplace."[6/] The Commission found that in order to be "competitively neutral," cost recovery mechanisms should not "give one service provider an appreciable, incremental cost advantage over another service provider" or "have a disparate effect on the ability of competing service providers to earn normal returns on their investment."[7/]

The Commission reached a similar conclusion when it implemented Section 276 of the Communications Act, which requires the Commission to foster competition in the payphone industry.[8/] The Commission required states to eliminate any rules that impose market entry or exit requirements on payphone service providers.[9/] States could impose regulations to provide consumers with information and price disclosure, but those regulations had to be "competitively

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(1999) (finding that a competitively neutral requirement must treat all participants and potential participants in the market alike); New England Public Communications Council Petition for Preemption Pursuant to Section 253, Memorandum Opinion and Order, 11 FCC Rcd 19713 at ¶ 20 (1996) (holding that state legal requirement was not competitively neutral because it allowed one class of providers, ILECs, to provide certain services, but barred another class of providers). See also TCI Cablevision of Oakland County at ¶ 108 ("[l]ocal requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory").

6/ Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 at ¶ 131 (rel. July 2, 1996).

7/ Id. at ¶¶ 132, 135.

8/ 47 U.S.C. § 276.

9/ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd 20541 at ¶ 60 (rel. Sept. 20, 1996).

neutral."[10/] Thus, any such regulations must "treat all competitors in a nondiscriminatory and equal manner, and not involve the state in evaluating the subjective qualifications of competitors to provide payphone services."[11/]

Any disparity in the treatment of ILECs and CLECs by municipalities gives the ILEC a substantial cost advantage over new entrants. Under Section 253(c), neither a state nor a local government may permit or impose such a disparity. Nondiscrimination and competitive neutrality are federal policies, embodied in the Communications Act, which preempt state and local enactments that are inconsistent with these policies.

II. CLEVELAND HEIGHTS' ACTIONS VIOLATE SECTION 253

A. Cleveland Heights' Actions Have the Effect of Prohibiting City Signal from Providing Telecommunications Services.

According to City Signal, it began discussions with Cleveland Heights about using the public rights-of-way to string aerial fiber on existing utility poles in July 1999.[12/] Cleveland Heights, however, refused to grant City Signal authorization to use the rights-of-way unless it agreed to put its fiber underground, despite the fact that other telecommunications providers, including the ILEC, have aerial fiber on utility poles throughout the City.[13/] City Signal has determined that placing its fiber underground in these circumstances would increase the cost of its facilities so significantly that it would make City Signal's service "non-competitive."[14/] City

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[10/] Id.

[11/] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, Order on Reconsideration, 11 FCC Rcd 21233 at ¶ 140 (rel. Nov. 8, 1996).

[12/] Petition, attach. 1 at 1.

[13/] Id. at 2.

[14/] Id.

Signal filed an official construction application on June 30, 2000, but the City has not responded to that application to date.[15/]

Under Ohio law, municipalities have the right to require utilities, including telephone companies and cable operators, to obtain municipal consent before constructing lines, poles, and other facilities in public rights-of-way.[16/] Accordingly, in order to provide facilities-based service in Cleveland Heights, CLECs like City Signal must obtain authorization from the City. Cleveland Heights argues that its actions have not prohibited City Signal or any other telecommunications carrier from providing service, because the City is willing to grant an authorization to any provider that will consent to its terms.

By refusing to grant City Signal authorization to provide service unless it agrees to terms that it believes will make its service non-competitive, however, Cleveland Heights is effectively prohibiting City Signal from providing service in the City.[17/] City Signal is faced with three undesirable alternatives: agree to Cleveland Heights' unreasonable terms, which will render its service non-competitive; be denied authorization to provide local service through its own facilities; or engage in protracted negotiation and litigation to obtain reasonable terms. Cleveland Heights' insistence that City Signal place its facilities underground as a condition of providing service therefore violates Section 253(a).

B. Cleveland Heights' Actions Are Not Competitively Neutral and Nondiscriminatory.

The Commission has previously indicated that a requirement for telecommunications providers to place their facilities underground, rather than overhead, may be a permissible rights-

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[15/] Id.

[16/] Id. at 3 (citing Ohio Rev. Code Chap. 4939).

[17/] AT&T has had similar experiences in other cities. See In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, CC Docket No. 96-98, Comments of AT&T Corp. at 28-30 (filed Oct. 12, 1999).

of-way management activity.[18/] The City claims its requirement is non-discriminatory and competitively neutral, as required by Section 253(c), because it has treated City Signal in the same manner that it has treated other telecommunications providers.[19/] But by Cleveland Heights' own admission, it permits the ILEC to maintain aerial facilities in the City. Stringing fiber optic cable on existing utility poles costs far less than digging new trenches or even pulling facilities through existing conduit. Given the substantial disparity between the costs of aerial and underground facilities, Cleveland Heights' preferential treatment of the ILEC will significantly affect City Signal's "ability to compete with other carriers for customers in the marketplace,"[20/] and is therefore neither non-discriminatory nor competitively neutral.

As the Commission has found in the past, competitive neutrality does not mean "that non-incumbents must be treated alike while incumbents may be favored."[21/] Yet this is precisely the result of Cleveland Heights' policy with regard to aerial construction. It is especially important during the transition to competitive markets that ILECs not benefit from built-in cost advantages over new entrants.[22/] As both Congress and the Commission have recognized, imposing costs that are not competitively neutral on new entrants may effectively preclude them from entering the local exchange market, in direct contradiction to the fundamental, pro-competitive objectives of the 1996 Act.[23/]

[18/] Classic Telephone at ¶ 39.

[19/] Opposition to Petition for Declaratory Ruling, filed by the City of Cleveland Heights, Ohio on Nov. 7, 2000, at 1, 3 ("City's Opposition").

[20/] Telephone Number Portability Order at ¶ 131.

[21/] Hyperion at ¶ 16.

[22/] H.R. Rep. 104-204, Part 1, at 49-50 (1995) ("House Report") (explaining that one reason the 1996 Act was needed was to eliminate the "government-sanctioned-monopoly status" of local exchange carriers that has historically protected them from competition).

[23/] See Telephone Number Portability Order at ¶ 138.

Removing the pro-incumbent bias in state and local regulation was a core objective of the 1996 Act.[24/] In order for Cleveland Heights' undergrounding requirement to be nondiscriminatory and competitively neutral, the City must either require the ILEC to put its facilities underground, permit CLECs to place their facilities above ground where the ILEC's facilities are above ground, or, at the very minimum, apply its undergrounding requirements to all new construction by the ILEC.

CONCLUSION

Cleveland Heights' requirement that City Signal place its telecommunications facilities underground has the effect of prohibiting City Signal from providing service in Cleveland Heights. The requirement therefore violates Section 253(a). Because the requirement is not competitively neutral and nondiscriminatory, it is not saved by Section 253(c). The Commission should therefore preempt the requirement, as requested by City Signal, and order Cleveland Heights to grant City Signal a permit to construct aerial fiber optic facilities in the City.

Respectfully submitted,

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24/ House Report at 49-50.

CERTIFICATE OF SERVICE

I, Michelle Mundt, hereby certify that on this 30th day of January 2001, I caused copies of the foregoing "Comments of AT&T Corp." to be sent to the following by either first class mail, postage prepaid, or by hand delivery (*):

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